STATE OF MICHIGAN

COURT OF APPEALS

HENRY MANN,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
February 27, 2007

No. 265323
Ingham Circuit Court
LC No. 04-000776-AA

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Plaintiff appeals, by delayed leave granted, from an order affirming the Department of Corrections' ("DOC") major misconduct citation against him and dismissing his petition for relief. We affirm.

Plaintiff is, and was at the time of the incident complained of, a prisoner housed in a Michigan Correctional Facility. On October 21, 2003, an incident occurred between plaintiff and a corrections officer, which resulted in plaintiff striking the officer and thereafter being written up for the major misconduct violation of "Assault Resulting in Serious Physical Injury—Staff Victim." At an October 24, 2003 hearing, after the hearing officer reviewed the hearings investigation report and statements from various witnesses, plaintiff was found guilty of the misconduct charge of "Assault and Battery—Staff Victim." Defendant appealed the disciplinary action to the circuit court, which affirmed the major misconduct citation.

The circuit court's review of the DOC's disciplinary decisions is limited to ascertaining whether the DOC's action was authorized by law or rule, and whether its decision or order was "supported by competent, material and substantial evidence on the whole record." MCL 791.255(4). The circuit court "may affirm, reverse or modify the decision or order or remand the case for further proceedings." MCL 791.255(5). This Court's review of the circuit court's decision is, in turn, limited to ascertaining "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996), lv den 456 Mich 902 (1997).

On appeal, plaintiff argues that the procedure employed in his hearing was unlawful and that the agency decision was not supported by competent, material, and substantial evidence on the whole record. Specifically, plaintiff directs this Court's attention to that portion of the

hearing officer's ruling wherein the hearing officer indicated doubt as to whether plaintiff was the aggressor in the incident. Plaintiff suggests that the officer's acknowledgement that he was likely not the aggressor entitled him to use force to defend himself against the corrections officer. We disagree.

The major misconduct report in this matter indicates that corrections officer Miller had been conducting a strip search of plaintiff when plaintiff struck him in the chest with a closed fist. Miller reported that he pushed plaintiff away and plaintiff began swinging wildly at him. According to the report, Miller and two other officers restrained plaintiff and escorted him to segregation.

At the hearing, plaintiff presented a contrary version of the events the transpired. Plaintiff contended that Miller pushed and struck him first and that only then did he swing at Miller in order to defend himself. The hearing officer considered both version of the altercation and ultimately changed the misconduct charge to assault and battery upon a staff victim. The hearing office sustained the amended misconduct charge, stating, in part:

> Prisoner admits he swung and hit CO Miller during an altercation, the bruise on Miller's forehead shows this and CO Norman and CO Kayfes report prisoner was struggling with Miller and they helped break this up. Charge is changed as there is considerable doubt prisoner started this altercation. Tellingly, CO Norman, who was in the room with both of these prisoners [sic], claims he did not see how it started, [and] gives vague answers on what occurred. This despite the fact he verifies both the prisoner and the other officer wanted him in this room as there was a possibility of an [sic] physical conflict.

According to the DOC Hearings Handbook, a prisoner may assert self-defense in a major misconduct proceeding, under "very narrow circumstances," and specifies six criteria, all of which must be met:

> (a) The prisoner must have had physical force used against him/her by another prisoner or prisoners, or reasonably believed that the use of physical force against him/her was imminent.
>
> (b) The prisoner claiming the defense was not the original aggressor.
>
> (c) The prisoner did not provoke the attacker.
>
> (d) The use of force was not by mutual agreement.
>
> (e) The prisoner had no reasonable alternative to the use of force in defending his/her physical well-being (e.g., retreat or calling for help from staff was not a possible alternative).
>
> (f) The prisoner did not use more force than was reasonably necessary for defense (if the prisoner fought back harder than necessary, s/he would be found guilty of fighting).

> If any of the above factors are not established to the satisfaction of the hearing officer, the defense shall not be accepted. The hearing officer, in rejecting the defense, must specify in writing on the misconduct hearing report which of the above factors was not proven by the prisoner. [DOC Hearings Handbook (July 1996), pp 42-43.][1]

As acknowledged by plaintiff, the above clearly applies only to a prisoner who had physical force used against him or her by another prisoner. As that did not occur here, plaintiff's reliance upon the above is misplaced.

"Assault and Battery" is defined in MDOC policy directive 03.03.105 as: "Intentional, non-consensual touching of another person done either in anger or with the purpose of abusing or injuring another; physical resistance or physical interference with an employee. Injury is not necessary but contact is." Here, plaintiff freely admits he hit Miller, albeit allegedly only in self-defense. Given the broad definition of "assault and battery" and given our limited scope of review, we cannot say the hearing officer's decision was not supported by competent, material, and substantial evidence on the whole record or that the trial court, in affirming the decision, misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.

Plaintiff next alleges that the MDOC's policy of allowing a prisoner to assert self-defense only when subjected to physical attack by another prisoner violates his rights to Equal Protection and Due Process. We disagree.

Due process claims require that a person prove that a state deprived him of a protected life, liberty, or property interest. *In re Wentworth,* 251 Mich App 560, 563; 651 NW2d 773 (2002). Similarly, to establish an equal protection claim, a plaintiff must also first establish a property or liberty interest. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp,* 237 Mich App 721, 740; 605 NW2d 18 (1999). "Although a prisoner retains some due process rights, prison disciplinary proceedings are not clothed with the same constitutional protections as criminal prosecutions." *Tauber v Department of Corrections,* 172 Mich App 332, 336; 431 NW2d 506 (1988). A prisoner is not entitled to the same constitutional rights and safeguards that are attendant to proceedings which resulted in the prisoner's initial loss of liberty. *Wolff v McDonnell,* 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974). The prisoner is, however, entitled to notice, an opportunity to present evidence and to make an oral or written argument before a hearing officer, and a decision based on the preponderance of the evidence. *Gee v Department of Corrections,* 235 Mich App 291, 296; 597 NW2d 223 (1999).

Additionally, restrictions on prisoners' rights are constitutional, under both the federal and our state's constitution, if they are reasonably related to legitimate penological interests. *Turner v Safley,* 482 US 78, 89; 107 S Ct 2254; 96 L Ed 2d 64 (1987); *Bazzatta v Dep't of*

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[1] Plaintiff reproduces one page of an apparently different edition of this handbook (judging from the pagination) and appends it to his brief on appeal, but that exhibit ends at subsection (e), and leaves out the information that immediately follows.

Corrections Director, 231 Mich App 83, 87-88; 585 NW2d 758 (1998). This is true even regarding the right to equal protection. *Bazzatta, supra* at 88. Prison administrators are accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell v Wolfish*, 441 US 520, 547; 99 S Ct 1861; 60 L Ed 2d 447 (1979); *Bazzatta, supra* at 87.

In the instant matter, plaintiff was provided his limited Due Process protections during the hearing. Plaintiff asserted self-defense at the hearing, and while the policy/rule relied upon only applied in situations regarding prisoner upon prisoner physical attack, the hearing officer clearly took into consideration plaintiff's claims. In fact, plaintiff's charge was changed, in large part, due to the hearing officer's perceptions of whether plaintiff had, in fact, employed self-defense.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Alton T. Davis
/s/ Deborah A. Servitto